2682

NO. 2622

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

H. C. AMES,
Plaintiff in Error,
vs.
JERRY SULLIVAN,
Defendant in Error.

ERROR TO THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, SECOND DIVISION

Brief of Plaintiff in Error

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Brief of Plaintiff in Error

STATEMENT.

This action was brought in the court below by N. O. Windquist against H. C. Ames, the plaintiff in error herein, to recover possession of a placer claim in the Kougarok District, Territory of Alaska, described as No. 32 Above Allen's Discovery, on the Kougarok River. The Complaint contained allegations of ownership in general terms and alleged an

ouster by Ames, defendant in the court below (Tr. pp. 1-2). The plaintiff in error, in his answer, sets up title to a portion of the premises sued for, claiming under the location of a claim called the "Kshunti Fraction", location of which is alleged to have been made July 25th, 1903, by one G. J. McLean (Tr. pp. 4-5). A half interest in this claim, "Kshunti Fraction", is alleged to have been conveyed to Ames, by deed in writing, and it is further alleged that ever since July 25th, 1903, Ames and McLean have owned and still own said "Kshunti Fraction" (Tr. p. 5). Before the trial, Jerry Sullivan, grantor of N. O. Windquist, was substituted as plaintiff in the place and stead of said Windquist (Tr. p. 25).

To sustain the issues on his part, plaintiff in the court below produced four witnesses, George J. McLean, N. O. Windquist, Gus Johnson and the substituted plaintiff, Jerry Sullivan. Their testimony is set forth in full in the transcript, pages 25 to 59. The witness McLean was called to identify a map of the premises in dispute, made by him from a survey made in June, 1912 (Tr. p. 25). From his testimony it appears that McLean knew nothing of the location prior to making a survey in order to prepare the map. McLean says:

"I made the map under the direction of Gus Johnson. He pointed out the stakes to me, I never

knew them before that time." (Tr. p. 27).

The map was introduced in evidence, and appears at page 32 of the Transcript.

Gus Johnson testified that he pointed out the stakes to McLean at the time the survey was made. He testified that he saw theoriginal stakes in 1902, was back in 1904, and the original stakes were gone, and he put up new ones (Tr. p. 28). In 1902 he saw a notice of location on the claim, and it had "N. O. Windquist Agent" on it (Tr. p. 29). At this point the plat having been introduced in evidence, N. O. Windquist, the original plaintiff in the case was called as a witness. He testified that in 1902 one Captain Kennedy showed him two location notices, saying "I have located two claims for you". Windquist testified further that the location notice was signed with his (Windquist's) name as locater, and Mr. Methe, as agent, and Tom Evans, as a witness, and that he, Windquist, never had been on the ground until after it was located (Tr. pp. 33-34). A copy of the location notice, as recorded, was introduced in evidence, (Tr. p. 35) reading as follows:

"PLACER LOCATION NOTICE

Know all men by these presents that I, the undersigned, have this day in accordance with the laws of the United States of America and the local rules and regulations and being otherwise legally entitled so to do, located and claim for placer mining purposes the

following described tract of land situated on Kougarok River in Kougarok Mining District, District of Alaska, being a portion of otherwise unoccupied Public Domain and situated for mining purposes only, to-wit:

Commencing at the intial stake being the lower center end stake and upon which a true copy of this notice is posted; thence in a Northerly direction as near as practicable at right angles to the general course of the stream 330 feet to corner stake No. 1, thence at right angles in a Westerly direction up stream as near as practicable parallel to the general course thereof 1320 feet to corner stake No. 2; thence in a Southerly direction at right angles 330 feet to the upper center end stake, thence continuing on the same line 330 feet to corner stake No. 3; thence at right angles in an Easterly direction down stream as near as practicable to the general course thereof 1320 feet to corner stake No. 4; thence at right angles 330 feet to the place of beginning, being the initial stake.

This claim shall be known as No. 32 Above Allen's Discovery on Kougarok River.

Located this ten day of January, A. D. 1902, in the presence of the undersigned witnesses.

N. O. WINDQUIST, Locator.
By N. METHE, Agent."

Witness: T. H. EVANS.

Filed for record 1 p. m. Mar. 29, 1902.

LARS GUNDERSON,
Recorder.

The witness Windquist continued testifying (Tr. pp. 36-44) in relation to having gone on the claim after its alleged location, for him, discovered gold, and his employment of Gus Johnson to work on the claim, and other matters tending to establish the location claimed by him.

Gus Johnson was recalled (Tr. p. 44). His testimony tended to corroborate Windquist. Johnson however was not on the claim until after it was located. Among other things the witness Johnson testified that in 1912 he was working on No. 32 and the defendant Ames put him off and that the assessment work for Windquist was not done for that year (Tr. p. 50). On re-direct examination the witness Johnson testifier *inter alia* as follows(Tr. pp. 50-52) :

"When I went to do the assessment work on this claim in 1912, it was after the commencement of this action. I had Brose with me to help me. Mr. Ames claimed to be in possession of all of claim No. 32. He said so. He told me to get off the claim if I wanted to keep out of trouble. 'Get off the ground', he said. I guess he was referring to claim No. 32. It was in the fall of the year 1912 that I attempted to do the assessment work on No. 32 in November. Ed Brose was with me. We worked one day close to the line of the Kshunti Fraction and the next day Ames would not let us work. The conversation between Ames and I took place on No. 32 in the hole where I was working. He told me to get out of there, that he would see that I did get out and took hold of me. I wrote Windquist about the affair. (Letter shown to witness). Yes that is the original letter I wrote to Windquist at that time on the 30th of November, 1912. It is in the Swedish language. (Witness shown translation of letter into the English language.) Yes that is a translation of the letter.

MR. COCHRAN—I offer the letter in evidence together with the translation.

MR. GRIGSBY—Objected to as incompetent, irrelevant and immaterial and self-serving. We

move that it be stricken out and that the jury be instructed to disregard it as self-serving and hearsay.

Motion denied. Letter admitted in evidence and marked Plaintiff's Exhibit 'C', to which ruling defendant then and there excepted and exception allowed."

The translation of said letter so admitted in evidence was as follows:

"Taylor, Alaska, November 30, 1912.

I have been up on No. 32 and done some work but Ames did not want me to work there. We had a little trouble. He was after me every day but to-day he came and threatened me with violence and I left as I did not wish to be pounded to death. He said that he would win that claim if he had to kill a number of persons so I did not wish to take any further chances and I left. You can go and see Reed about what we shall do.

Yours,
GUS JOHNSON."

Jerry Sullivan, called as a witness in his own behalf, as substituted plaintiff, identified copy of deed to him from Windquist, of the premises in dispute, dated in 1914. He did not testify as to any facts relating to the location of the claim (Tr. pp. 55-59).

The foregoing is, in our opinion, a full and fair statement of the evidence for plaintiff concerning the location of No. 32, for the original plaintiff, Windquist.

The defendant first offered in evidence the deposition of N. Methe, the identical person who is claimed by plaintiff to have located the premises in dis-

pute for Windquist. Methe, who is a disinterested witness, residing in New Bedford, Mass., testified fully and positively that he did not locate the claim for Windquist, but that he did at the time mentioned locate the claim for one Heinze (Tr. p. 60), that Evans assisted him and witnessed the location notice (Tr. pp. 61-62), and that he sent the location notice to the Recorder by Captain Kennedy (Tr. p. 62). The following questions and answers are found in the deposition of the witness Methe: (Tr. pp. 62-63).

"Q. Whose name, if any one, was given in said notice as locator and what name as a witness and what name as agent for the locator?

A. Heinze as locater, T. H. Evans as witness, and N. Methe as agent.

* * * * * * * * *

Q. If, in answer to a previous interrogatory, you have stated that you gave the location notice of No. 32 Above Allen's Discovery to J. C. Kennedy to be recorded, state whether or not you authorized him at any time to make any change in said location notice with reference particularly to changing the name of the locator named therein.

A. I never authorized such a change.

Q. Did you ever authorize him to substitute the name of N. O. Windquist for the name of ——— Heinze in said notice?

A. No, I never authorized him to change name.

Q. Did you ever, at any time, locate any claim on the Kougarok River for N. O. Windquist?

A. No."

T. H. Evans was also called and sworn as a witness and he corroborates Methe to the effect that No. 32, the premises in question, was not located in the name of or for Windquist, but for one Heinze. His testimony appears, commencing at page 73 of the transcript, and is positive and direct. He describes fully the location of the claim by Methe for Heinze, and the drawing up of the location notice and the fact that he witnessed the notice (Tr. p. 75). The witness Evans testified that he and Methe discovered gold on No. 32 prior to its location for and in the name of Heinze (Tr. p. 81).

H. C. Ames, the defendant in the court below, testified in his own behalf (Tr. pp. 87-111). He described fully and accurately the location of the Kshunti Fraction, in 1903, the marking of the boundaries and discovery of gold thereon. The boundaries of the Kshunti Fraction, he states, are approximately correctly shown on the map introduced by plaintiff (Tr. p. 87). His original location notice was introduced in evidence. It appears by the endorsements to have been recorded in 1908, but it is evident that this is a mistake. It was recorded in 1903 (Tr. p. 106). The deed, conveying a one-half interest in the claim to Ames, executed in 1905, was introduced in evidence (Tr. p. 91). Ames testified as to the work done on his fraction as follows: (Tr. p. 94).

"Since 1904 I have performed the annual labor on the Kshunti Fraction and have done from two to six hundred dollars worth of work every year since. I have sunk more than twenty odd holes to bedrock, twenty-seven I think it was, besides drifting."

Ames admitted driving Johnson off the fraction in 1912, but denies the threats of killing, or that he ever drove Johnson off that part of No. 32 not in conflict with the fraction. The witness testified:

"I went over there and drove Cayuse Johnson off the claim. I did not tell him at that time I was going to have that claim if I had to kill everybody in Kougarok. I drove him off the Kshunti Fraction. I did not at that time assert any title to the rest of No. 32 as shown on that map, nor put any body off from there. I have never tried to prevent their doing work on the balance of No. 32." (Tr. p. 98).

Ed Moran, who witnessed the location of the Kshunti Fraction, testified for defendant in the court below and fully corroborates Ames as to the location of the claim (Tr. pp. 111-112).

Captain Kennedy referred to in the evidence died some time prior to the year 1912 (Tr. p. 114).

At the close of the evidence, the defendant's counsel made the following Motion (Tr. p. 118):

"MR. LOMEN.—I move at this time for permission to file an amended and supplemental answer in this case alleging forfeiture of any claim known as No. 32 Above Allen's Discovery, if ever located because of failure to do assessment work on the claim in 1911 and also in 1912. As far as the 1912 work is concerned it is an alleged fact that occurred subse-

quent to the commencement of this action."

This Motion was denied, and exception reserved (Tr. p. 118).

The jury returned a verdict for plaintiff, upon which judgment was entered. And defendant thereupon sued out this Writ of Error.

SPECIFICATION OF ERRORS.

I.

The Court erred in overruling defendant's objection to the following testimony of George J. McLean, a witness produced for the plaintiff, as follows: (George J. McLean testifying).

"After I heard that the Kshunti Fraction had been located, I had a conversation with Mr. Ames with reference to it.

Q. What did you tell him?

MR. LOMEN.—Objected to as immaterial.

THE COURT.—Overrule the objection.

To which ruling an exception was duly made and allowed.

A. I told him, I said, 'You had better cut this fraction business out.' I said, 'I will have nothing to do with a claim that is jumped.'

MR. LOMEN.—Move that the answer be stricken out.

THE COURT.—Overrule motion.

To which ruling an exception was duly made and allowed.

II.

The Court erred in overruling defendant's objection to the following testimony of George J. McLean, a witness produced on behalf of the plaintiff, as follows: (Witness testifying).

"I was requested several years ago by Mr. Windquist to make a survey of this ground.

Q. What was the survey to be made for?

MRR. GRIGSBY.—Objected to as immaterial and self-serving.

THE COURT.—Objection overruled.

To which ruling an exception was taken and allowed.

"A. I was instructed to survey No. 32 by Mr. Windquist. He told me that his claim had been jumped."

III.

The Court erred in admitting in evidence plaintiff's Exhibit "C", being the letter of Gus Johnson to N. O. Windquist, the translation of which reads as follows:

"Taylor, Alaska, November 30, 1912.

I have been up on No. 32 and done some work, but Ames did not want me to work there. We had a little trouble. He was after me every day but today he came and threatened me with violence and I left as I did not wish to be pounded to death. He said he would win that claim if he had to kill a number of persons so I did not wish to take any further chances

and I left. You can go and see Reed about what we shall do.

Yours,
GUS JOHNSON."

IV.

The Court erred in overruling defendant's motion made after defendant and plaintiff rested, and before the case was submitted to the Jury, as follows:

"MR. LOMEN.—I move at this time for permission to file an amended and supplemental answer in this case alleging forfeiture of any claim known as No. 32 Above Allen's Discovery, if ever located, because of failure to do assessment work on the claim in 1911 and also in 1912. As far as the 1912 work is concerned, it is an alleged fact that occurred subsequent to the commencement of this action.

THE COURT.—Motion overruled."

To which ruling an exception was duly taken and allowed.

ARGUMENT

I.

THE TRIAL COURT ADMITTED INCOMPETENT EVIDENCE, PARTICULARLY THE LETTER OF THE WITNESS GUS JOHNSON TO N. O. WINDQUIST. THESE ERRORS WERE PREJUDICIAL FOR WHICH THE JUDGMENT SHOULD BE REVERSED.

While the witness, Gus Johnson, was on the stand testifying for plaintiff as to what he did on No.

32, the claim in dispute, in the year 1912, and had detailed how the plaintiff in error, Ames, had put him off the ground, he testified as follows:

"I wrote Windquist about that affair. (Letter shown witness.) Yes, that is the original letter I wrote Windquist at that time, on the 30th of November, 1912. It is in the Swedish language. (Witness shown translation of the letter into the English language.) Yes, that is the translation of the letter.

MR. COCHRAN.—I offer the letter in evidence together with the translation.

MR. GRIGSBY.—Objected to as incompetent, irrelevant, and immaterial and self-serving. We move that it be stricken out and that the jury be instructed to disregard it as self-serving and hearsay.

Motion denied. Letter admitted in evidence and marked Plaintiff's Exhibit "C", to which ruling defendant then and there excepted and exception allowed."

The translation of said letter, so admitted in evidence, was as follows:

Taylor, Alaska, November 30, 1912.

I have been up on No. 32 and done some work but Ames did not want me to work there. We had a little trouble. He was after me every day but today he came and threatened me with violence and I left as I did not wish to be pounded to death. He said that he

would win that claim if he had to kill a number of persons so I did not wish to take any further chances and I left. You can see Reed about what we shall do.

Yours,

GUS JOHNSON."

We respectfully submit that the court, in admitting this letter, committed error for which the judgment should be reversed. It can hardly be disputed that the letter is mere hearsay and incompetent. The statement in this letter saying, "He said he would win the claim if he had to kill a number of persons, so I did not wish to take any further chances and I left", is not testified to by the witness Johnson in any manner except by the mere introduction of the letter from the witness to Windquist. To charge by hearsay evidence that one of the parties to the suit threatened to commit several murders in order to win the lawsuit constitutes, we urge, most material error.

Under no view of the case could such an error be considered immaterial. It is well settled in this Court, that:

"Material evidence erroneously admitted in a trial before a jury is always reversible error, unless it can be properly said that such admission was, without doubt, without injury."

United States v. Honolulu Plantation Co., 122 Fed., 581, 583 (*Citing*: *Mexia v. Oliver,* 148 U. S. 664,

13 Sup. Ct. 754, 37 L. Ed. 602; *Boston & Albany R. R. Co. v. O'Reilly,* 158 U. S. 334, 15 Sup. Ct. 830, 39 L. Ed. 1006; *V. & M. R. R. Co. v. O'Brien,* 119 U. S., 99, 7 Sup. Ct., 172, 30 L. Ed. 299; *Gilmer v. Higley,* 110 U. S. 47, 3 Sup. Ct. 471, 28 L. Ed. 62; *National M. Association v. Shryock,* 20 C. C. A. 3, 73 Fed. 774; *St. Louis, etc. Ry. Co. v. Needham,* 11 C. C. A. 56, 63 Fed. 107, 25 L. R. A. 833).

In the case at bar the evidence preponderates in favor of the plaintiff in error, or at the most is conflicting and equally balanced. It was therefore particularly important that no errors be committed in allowing incompetent evidence to be introduced.

The only two persons who were present when the location was made, under which plaintiff claims, were the witnesses Methe and Evans, and they both testify positively that the location was not made for or in the name of Windquist, but for and in the name of one Heinze. (Tr. pp. 60, 64, 74, 80, 81).

The Court is earnestly requested to carefully read the Deposition of the witness Methe (Tr. pp. 59-71). In the most favorable aspect for the defendant in error the evidence can only be said to be conflicting and evenly balanced. In such a case it is most important that no prejudicial errors be made in evidence admitted. The case in this respect is very like the case of *Leedy v. Lehfelt,* reported in 162 Fed.,

p. 304, where a case very similar to the one at bar was reversed by this Court because of an error in the Court in admitting in evidence a very brief note or letter, written by one of the parties, which was held to be inadmissable. The Court, in *Leedy v. Lehfelt, supra,* referring to the letter in question, says, at page 163:

"It was not a very important or conclusive item of evidence, but in a case where, as in this, a clearly defined issue of fact was presented, and the evidence was directly contradictory, and nearly evenly balanced, it may readily be seen that such evidence, received for the purpose for which it was offered, and admitted under the sanction of the court, unaccompanied by any charge to the jury as to its probative value, may have been determinative in the minds of the jury in solving the question as to where the preponderance of the evidence lay."

This brief could be extended by an exhaustive and minute discussion of the evidence to show how strongly it preponderates in favor of the plaintiff in error, but the number of the witnesses is so few, and the record of the whole evidence so comparatively short, that we feel justified in asking the Court to read the entire evidence in order to form a just and fair conclusion on this point.

The evidence set forth in the specifications of error Nos. one and two, (Tr. pp. 26-27), was also hearsay, and we think clearly inadmissible for the reasons

already urged, and affords additional reason for the reversal of the Judgment.

II.

THE COURT ERRED IN OVERRULING THE MOTION OF THE PLAINTIFF IN ERROR FOR LEAVE TO FILE AN AMENDED AND SUPPLEMENTAL ANSWER.

At the close of all the evidence, counsel for plaintiff in error made the following Motion: (Tr. p. 118).

"MR. LOMEN.—I move at this time for permission to file an amended and supplemental answer in this case alleging forfeiture of any claim known as No. 32 Above Allen's Discovery, if ever located, because of failure to do assessment work on the claim in 1911 and also in 1912. As far as the 1912 work is concerned it is an alleged fact that occurred subsequent to the commencement of this action."

This Motion was overruled, to which defendant duly excepted, and assigns and specifies the same as error. (Tr. p. 149).

There were no issues made by the pleadings as to the assessment work for the year 1912 as the issues were made up before the end of that year (Tr. pp. 7-8.) However, evidence was admitted without objection that the assessment work was not done for the year 1912 (Tr. pp. 50-51). It is true that Johnson testified that the plaintiff in error Ames run him off the claim (Tr. p. 50), but this Ames positively denies. Ames testified on this point as follows:

"I drove him off the Kshunti Fraction. I did not at that time assert any title to the rest of that No. 32 as shown on that map, nor put anybody off from there. I never tried to prevent their doing work on the balance of No. 32."

If the assessment work was not done on No. 32 in 1912, the plaintiff's title automatically lapsed and became void.

Thatcher v. Brown, 190 Fed., 708.

It having been disclosed by the evidence introduced without objection that the assessment work for the year 1912 was in fact not performed by plaintiff's grantor, it was the clear duty of the court to allow defendant in the court below to file an amended and supplemental answer setting up this fact.

Compiled Laws of Alaska, Sections 924, 930;
Carter's Code, Sections 92 and 98.

In the case of *Ebner v. Alaska Juneau Gold Mining Co.,* 210 Fed., 599, this Court approved of an order which permitted the defendant to amend its answer after the close of the trial in order to set up failure to perform assessment work. The Court there said:

"The action of the court in allowing such an amendment was clearly within the exercise of sound discretion. Carter's Alaska Code, Pt. 4, Sec. 92."

In the case at bar we submit the court below did not properly exercise this sound discretion and its

action is subject to review and correction by this Court.

Section 924 of the Compiled Laws of the Territory of Alaska (Carters Code, pt. 4, Sec. 92) was taken verbatim from the laws of Oregon.

1 Hills Annotated Laws of Oregon, Sec. 101, p. 241.

Prior to the enactment of this section of the laws of Oregon into the Code of Alaska the Supreme Coure of Oregon had spoken conclusively on this subject. In *Cook v. Criosan,* 36 Pac., 532, that Court held, quoting the language of the Syllabus:

"Where theevidence is received without objection as to material matters set not set up in the pleadings, a refusal of leave to amend so as to conform the pleadings to the real issue tried, is reversible error."

In discussing this question, the Oregon Court says:

"The power of the court to allow amendments is not entirely discretionary. It is granted to advance justice, and should be exercised liberally, in proper cases. The parties in this case were before the court, and introduced their evidence upon the real point in controversy between them, without objection. Under such circumstances when the trial court refused to allow the defendant to amend his answer so as to conform to the facts proved and litigated, thereby excluding such evidence from the consideration of the jury, its action injuriously affected the substantial rights of the defendant, and constituted a reversible error."

The rule adopted by the Federal Courts is the same. In the case of *United States v. Lehigh Valley Railroad Company,* 222 U. S., 257; 31 Sup. Ct. Rep. 387, the Supreme Court of the United States reversed the decision of the lower Court for an "abuse of discretion" in refusing leave to amend complainants bill.

In *Owl Creek Coal Co. v. Golcb,* 210 Fed., 209 (C. C. A.) one of the reasons given for the reversal of the judgment was the error of the trial court in refusing to permit amendments to the answer.

The rule of this Court is fully stated in *Coer D'Alene Lumber Co. v. Thompson,* 215 Fed., 8-15, where it is distinctly stated that the discretion of the trial court in permitting or refusing amendments is subject to review in proper cases of the abuse of this discretion.

Morrow, Circuit Judge in the case last cited, quotes from *McDonald v. Nebraska,* 101 Fed., 171-176 (C. C. A.) as follows:

"The right and duty of the federal courts to allow amendments does not rest on state statutes only. It is conferred on them by the Judiciary Act of 1789. That act was framed by the great statesmen and lawyers who had actively participated in the struggle to establish the political independence of their country. When this object had been achieved, and the Constitution adopted, they framed an act for the organization and government of the national courts

which has remained for more than a century a monument of their great wisdom, foresight, and sense of justice. The thirty-second section of that act (now section 954 of the Revised Statutes) was designed to free the administration of justice in the federal courts from all subtle, artificial and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits. This act emancipated the judicial department of the government from the shackles of artificial and technical rules, which had theretofore been interposed to obstruct the administration of justice, as completely as the Revolution had emancipated the political department of the government from foreign domination. This was done by investing the federal courts with plenary power to remove by amendment all such impediments to the attainment of justice."

Under this just and liberal rule, we think the court below committed error in not permitting the amendment to the answer to conform to proofs admitted without objection.

For the reason stated a reversal of the judgment is asked.

Respectfully submitted.

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